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24123-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

VIRGIL R. MONTGOMERY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE MICHAEL P. PRICE

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

Being lengthy, appellant's assignments of error will not be repeated here.

II.

ISSUES PRESENTED

(1) Did the evidence support the verdict?

(2) Was improper opinion testimony elicited?

(3) Was defendant's Sixth Amendment right to remain silent violated?

(4) Was there error in giving the missing witness instruction?

(5) Has defendant established that his counsel rendered ineffective assistance?

III.

STATEMENT OF THE CASE

Defendant/appellant Virgil Montgomery was charged in the Spokane County Superior Court with one count of possession of pseudoephedrine with intent to manufacture methamphetamine. CP 1.

The matter was tried to a jury before the Honorable Michael Price. RP 1 *et seq.*[1]

Detectives surveying the cold medicine aisle at a Target store in the Spokane Valley saw the defendant and his co-defendant, Joyce Biby, enter the store and proceed to that location. The defendant pointed out some cold pills to his companion. He then selected two boxes of them and walked off. His companion then walked off, but returned to the aisle and selected two boxes of the same product the defendant had pointed at. RP 32-34, 112-113. The defendant went and paid for his pills. RP 35, 113. The co-defendant picked up some paper towels and then paid for both of her items at a different checkout stand. RP 35, 113. She joined up with the defendant who was waiting in the front of the store. RP 35. Their suspicions aroused, the detectives decided to follow the pair. RP 35-36, 113-114.

The couple next drove to the Dollar Store where two $1 reading glasses were purchased. RP 114. They walked to the nearby Rosauers grocery store. Defendant walked back to the pharmacy and obtained a redemption slip to purchase another box of cold pills. His companion went off with a shopping cart. RP 36-37, 114-115. She

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[1] RP denotes the consecutively numbered transcript of the trial proceedings filed by Crystal Hicks. Any reference to the other transcripts will be by "date/RP" format.

purchased three boxes of matches; each box contained 50 books of matches. RP 37-38. Defendant purchased one box of Sudafed. RP 38.

They drove next to a K-Mart store and "shopped around" without purchasing anything. RP 38-39, 115. They then drove to a Wal-Mart in north Spokane. RP 39, 115. There the two shopped together, but split into separate checkout lines. Defendant purchased a gallon of acetone and the co-defendant purchased two cans of denatured alcohol. RP 39. The detectives felt that the couple was purchasing the ingredients to make methamphetamine and hoped to follow them to their lab. RP 40, 116-117. From Wal-Mart the couple drove to a nearby Target store. There the defendant pointed out a particular cold medicine and his co-defendant bought two boxes of it. Defendant went and bought a large bottle of hydrogen peroxide and went to a different checkout line than his partner was in. RP 41, 117. The couple then left the area and began driving towards the north county line. The detectives had a patrol vehicle stop the car. RP 42, 118.

The pair was arrested. A search of the vehicle found seven boxes of cold pills, eight boxes of matches, acetone, denatured alcohol, paper towels, and a light bulb that had been turned into a "crack pipe" that could be used to smoke cocaine or methamphetamine. The pipe was located under the passenger seat. The defendant had been driving. There

were receipts from nine different stores bearing the current date. RP 44-45, 48-53, 119.

A chemist from the crime laboratory explained to the jury how to manufacture methamphetamine. He explained how the ingredients purchased by the couple included most of the necessary items to make the drug. RP 141-149. He agreed on cross examination that the drug could not be produced using only the ingredients found in the car. RP 151-157.

Defendant took the stand in his own behalf and told the jurors that he and his friend shopped various stores to take advantage of the better prices found in Spokane than in their hometowns of Newport, Washington, and Old Town, Idaho. He purchased items for his needs and she for hers. RP 169-174. He looked at solvents and bought the acetone to help with repairs he was making to the trailer he was renting. RP 167, 179, 184. He purchased the hydrogen peroxide to care for his grandson's dog, which had a cut on its leg. RP 182. The defendant told the prosecutor that he had not much discussed the case with his son or grandson. RP 188. The fourteen year old was in school that day. RP 191.

The defendant's daughter, a reserve marine deputy sheriff for Bonner County, Idaho, testified briefly to corroborate the testimony about the dog. RP 195-196. She also told the jury that her nephew was in school that day. RP 197-198.

The trial court gave a missing witness instruction over the objection of the defense. RP 220-221. The prosecutor had argued that the instruction was appropriate given the absence of the landlord and the grandson. RP 211. In his closing argument the prosecutor did note the absence of both of those potential witnesses. RP 237, 239. The arguments of the parties focused on whether defendant was involved in innocent or suspicious behavior in the assembly of the various ingredients. RP 230-265. The jury found the defendant guilty. CP 28.

The court imposed a low-end standard range sentence as requested by the parties. CP 29-41; RP 281. The court declined to make a finding, requested by the State but opposed by the defense, of chemical dependency since there was no evidence to support it. RP 272, 274, 280. The State opposed a DOSA sentence and the defense indicated there was no basis for imposing one. RP 272, 275. Defendant then appealed to this court. CP 44-46.

IV.

ARGUMENT

A. THE EVIDENCE SUPPORTED THE DETERMINATION THAT DEFENDANT WAS INTENDING TO MAKE METHAMPHETAMINE.

The first claim presented is a contention that the evidence did not support the verdict. The suspicious behavior easily led to the verdict of guilty. The evidence supported that determination.

The standard for adjudging the sufficiency of the evidence to support a verdict is well established. The test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proved beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). In adjudging the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. State v. Lopez, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995); State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). Application of that standard requires affirmance of this conviction.

The jury was permitted to conclude that the two companions were working together. The total quantity of goods makes a strong case. There were seven packages of pseudoephedrine, obtained in four purchases

at three stores. Defendant was the one who showed his partner which product to purchase at each location. There were eight boxes of matches for a total of 400 matchbooks. There also was the denatured alcohol, the hydrogen peroxide, and the acetone, along with a filtering agent (the paper towels). The group of scattered small purchases of these "innocent" items, particularly by traveling companions who always made separate purchases at different registers, highlighted that efforts were being made to not draw suspicion. As this court recently noted, companions who split up to buy ephedrine products are involved in suspicious behavior that can justify an investigative stop. State v. Carlson, --- Wn. App. ---, 123 P.3d 891 (2005).[2] There simply was no need to visit all of those stores, including two branches of the same retailer, unless one was trying to hide what he or she was doing. The defendants were well aware of their incriminating behavior and made efforts to avoid detection by lowering suspicion at any one store. But for the fact that the detectives stumbled across them early in their shopping activities, they probably would have gotten away with it.

This evidence permitted the jury to conclude that defendant possessed the large quantity of pseudoephedrine with the intent of turning it into methamphetamine. The evidence was sufficient to justify the verdict.

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2 A petition for review is pending. *See* No. 78185-1.

B. THERE WAS NO IMPROPER OPINION TESTIMONY.

Defendant next contends that the officers improperly expressed opinion testimony concerning defendant's intent to manufacture methamphetamine. Defendant did not object to the testimony and can hardly complain at this point. The evidence also was properly admitted.

Defendant contends that this issue involves a manifest constitutional error that he can raise for the first time on appeal. RAP 2.5(a)(3). It does not. Seattle v. Heatley, 70 Wn. App. 573, 577-579, 854 P.2d 658 (1993), *review denied* 123 Wn.2d 1011 (1994).[3] That is because ER 704 does permit, with proper foundation, opinion testimony concerning the ultimate issue of fact. Thus, testimony concerning ultimate facts, such as the defendant's state of mind, is permissible and does not raise a constitutional issue. Id. at 578-579. In those instances in which opinion testimony has been found to present a problem, it is invariably in the circumstance where the testimony comments on the credibility of a witness or the defendant. *E.g.*, State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) [Improper to admit opinion that victim suffered from rape trauma syndrome

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[3] The Washington Supreme Court will hear argument on February 7, 2006, in two cases raising a similar issue: State v. Kirkman, no 76833-1 and State v. Candia, no. 77596-6.

in rape prosecution with consent defense because the existence of syndrome suggested victim had been raped].

Here, the two now challenged expressions of "opinion" fell within the Heatley analysis – the experts concluded what defendant was up to based on their experience with similar cases. This was admissible testimony under ER 704. State v. Heatley, supra. It was understandable why defense counsel did not challenge the testimony. There is no manifest constitutional error presented.

C. THERE WAS NO COMMENT ON THE RIGHT TO REMAIN SILENT.

Defendant next contends that his right to remain silent was infringed when a detective testified in rebuttal that no one had approached him to explain the items defendant had purchased. RP 205. There was no comment on the right to remain silent and certainly no intention to argue any inferences from the exercise of that right. If anyone put the issue in front of the jury, it was the defense.

The law in this area is well understood. The basic variations of an alleged Fifth Amendment violation have been addressed by prior cases. It is improper, for instance, for the prosecution to impeach a defendant's trial testimony with evidence of the defendant's initial decision to exercise the Fifth Amendment right to remain silent and thus draw an

inference of guilt from the activity. Doyle v. Ohio, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976). Similarly, it is impermissible for the prosecution to bring out the defendant's exercise of the right to remain silent during the case in chief and comment upon that during closing argument. State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979). It likewise is improper to present evidence that defendant declined to speak to an officer and was a "smart drunk" and then argue those points to the jury in closing. State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996). When a defendant waives his right to remain silent by giving a statement to police, the prosecution can properly comment on the statements given. State v. Belgarde, 110 Wn.2d 504, 511, 755 P.2d 174 (1988); State v. Scott, 58 Wn. App. 50, 54-55, 791 P.2d 559 (1990).

Before a comment on the right to remain silent is found, however, there first must be a determination "whether the prosecutor manifestly intended the remarks to be a comment on that right." State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). It is clear that there was no such prosecutorial intent in this case. The detective took the stand immediately after the defendant's daughter, herself in law enforcement, told jurors about the use of hydrogen peroxide on the injured dog. The prosecutor carefully circumscribed the testimony by asking him if, starting the day after the arrest, anyone had come forward with alternative

explanations for the items defendant purchased. The answer was no. RP 205. This testimony followed closely after the defendant's daughter had been cross examined on her failure to communicate with the detectives investigating this case. RP 198. The court sustained a defense objection to the question. RP 199. The rebuttal question picked up this theme. Circumscribed as it was – deliberately picking up the day after the arrest (and assertion of rights) – it most certainly was not a comment on the right to remain silent.

What occurred next took the issue closer to the constitutional question. The defense attorney asked the detective if he had contact with the defendant the next day. The officer answered that he had. RP 206. Counsel then asked: "And you didn't ask him if he had anything to say?" which drew the answer "He was in custody." RP 206. At that point counsel dropped cross examination. The prosecutor then inquired why no questions had been asked. The detective replied: "It was already made clear to me from him from the previous day that he didn't want to talk to me." RP 207. While that exchange necessarily came close to the constitutional issue, it was necessary to counter the false impression left by the defense that defendant had not been given the opportunity to talk to the officer. There was no intent to highlight and exploit the defendant's right to remain silent.

The rebuttal testimony did not infringe the right to remain silent and properly addressed issues presented by the defense case and the defense cross examination. There was no violation of the Fifth Amendment.

D. THE COURT DID NOT ABUSE ITS DISCRETION IN GIVING THE MISSING WITNESS INSTRUCTION NOR DID THE INSTRUCTION SHIFT THE BURDEN OF PROOF.

Defendant next contends, in two related arguments, that the court erred in giving the standard "missing witness" instruction and that doing so shifted the burden of proof in the case. The court did not abuse its discretion in this area as the evidence presented at trial justified the instruction. There likewise was no burden-shifting since the defense presented a case.

Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. State v. Dana, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). The trial court also is granted broad discretion in determining the wording and number of jury instructions. Petersen v. State, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). A missing witness instruction is appropriate if a party fails to produce witnesses, peculiarly available to them, who have information on a material topic. State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

That was the situation here. Defendant had produced explanations for the two precursors he had purchased – the hydrogen peroxide and the acetone. The former was used for his grandson's dog and the latter to remove tiles from his trailer per his agreement with the landlord. RP 179, 182, 184. He did not present the natural witnesses who would support those stories – his grandson and his landlord. Those witnesses were peculiarly available to him and they had information on the critical issue in the case – the reason for purchasing these components of a drug manufacturing operation. The foundation for the missing witness instruction was present.

Older cases similarly recognized that presenting a partial case opens up the defense for inquiry and argument about missing witnesses. *E.g.*, State v. Cozza, 19 Wn. App. 623, 627-628, 576 P.2d 1336 (1978) [failure to call witness to corroborate defendant's trial testimony]; State v. Contreras, 57 Wn. App. 471, 473-475m, 788 P.2d 114, *review denied* 115 Wn.2d 1014 (1990) [proper to cross examine defendant about absence of alibi witness he supposedly was with at the time of the crime]; State v. Barrow, 60 Wn. App. 869, 871-873, 809 P.2d 209, *review denied* 118 Wn.2d 1007 (1991) [proper to argue "where is his brother" in case where defendant testified drug pipe belonged to his brother]. This rule is similar to that involving the Fifth Amendment. When a defendant waives

his right to remain silent by giving a statement to police, the prosecution can properly comment on the statements given, including what the statement did not address. *E.g.,* State v. Belgarde, supra at 511; State v. Scott, supra at 54-55. It is for this reason that defendant's burden shifting claim fails. The prosecutor took great care to remind the jury that the defense did not have to prove anything. However, once the defense undertook to present evidence, the jury could and should consider what the defendant failed to do to support his claims. RP 241, 264.

This case falls squarely within the Cozza fact pattern. There were two witnesses who could corroborate defendant's story. He did not call them. They were particularly available to him since he had not revealed their identities until he testified. There was no error in giving the missing witness instruction. Similarly, the use of that instruction did not shift the burden of proof. The only instruction on burden of proof put that obligation squarely on the government. The prosecutor's argument reinforced that obligation. There was absolutely no error in this regard.

E. THE TRIAL COURT DID NOT ERR BY FAILING TO ADDRESS A SENTENCING ALTERNATIVE NOT RAISED BY THE PARTIES.

Defendant next claims the trial court erred by failing to consider a first offender option sentence. The parties did not address the

point at sentencing. The trial judge could not have erred under the circumstances.

The governing authority is RCW 9.94A.585(1), the first sentence of which states in part: "A sentence within the standard range ... shall not be appealed." That is the situation here. Defendant admittedly received a standard range sentence. He can not challenge it. State v. Mail, 121 Wn.2d 707, 854 P.2d 1042 (1993). A First Offender sentence is considered to be with the standard range and also can not be appealed. State v. Welty, 44 Wn. App. 281, 726 P.2d 472, *review denied* 107 Wn.2d 1002 (1986). Similarly, the decision to not impose an exceptional sentence is not appealable. State v. Friederich-Tibbets, 123 Wn.2d 250, 866 P.2d 1257 (1994); State v. Medrano, 80 Wn. App. 108, 906 P.2d 982 (1995).

A party can appeal the trial court's failure to follow a *mandatory* sentencing procedure. State v. Mail, supra at 713-714. What thus can be challenged when a standard range is imposed is the *process* by which it was imposed. State v. Conners, 90 Wn. App. 48, 950 P.2d 519, *review denied* 136 Wn.2d 1004 (1998); State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997) [refusal to exercise discretion can be challenged]. Appellant, however, has not established that the trial court failed to follow a mandatory process or otherwise erred

at sentencing. Since no one requested the trial court to consider a first offender sentence, the trial court could not err by failing to articulate a reason for rejecting it. One does not know on this record if the trial court considered the possibility or not. Because of that, defendant can not get within the Mail procedural challenge exception.

Appellant can not challenge his sentence in this manner. This claim should be rejected.

F. DEFENDANT HAS NOT ESTABLISHED THAT HIS COUNSEL PERFORMED INEFFECTIVELY.

Defendant's last argument[4] is a contention that his counsel rendered ineffective assistance on the opinion testimony and First Offender sentencing arguments. While normally respondent would not address such an argument where the merits of the individual claims have been addressed on their own, respondent will briefly address the merits of one of the claims.[5]

Familiar law governs this area. Washington has adopted the standard for reviewing the effectiveness of trial counsel set forth in

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[4] Defendant does make a cumulative error claim, but that will not be addressed as appellant has not proven that multiple errors occurred below.

[5] If the alleged errors were prejudicial, this court would reverse on that basis and there would be no need to discuss counsel's alleged ineffectiveness. If the alleged errors were not prejudicial, then defendant could not meet the Strickland standard and the claim of ineffective assistance would founder on that basis. In either circumstance, the ineffective assistance claim is redundant and need not be addressed.

Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984). *See* State v. Leavitt, 49 Wn. App. 348, 355-59, 743 P.2d 270 (1987), *affirmed* 111 Wn.2d 66, 758 P.2d 982 (1988); State v. Sardinia, 42 Wn. App. 533, 713 P.2d 122, *review denied* 105 Wn.2d 1013 (1986). That standard employs a two-part test. First, a defendant must show that counsel made errors so serious that he was not functioning as counsel. A standard of reasonableness is applied, and the defense must overcome a presumption that the attorney may be engaged in trial strategy. Strickland, 466 U.S. at 689; Leavitt, supra at 358-359. It also is clear that an attorney's strategic choices are "virtually unchallengeable" and thus are not a basis for finding counsel to be ineffective. Strickland, 466 U.S. at 690.

Secondly, counsel's error must undermine the confidence in the fairness of the trial. Leavitt, supra at 358-359. The reviewing court must consider the entire case in making its determination of counsel's effectiveness. Additionally, courts do invoke a presumption that counsel was competent and rendered effective assistance. State v. Serr, 35 Wn. App. 5, 12, 664 P.2d 1301 (1983); Strickland, 466 U.S. at 694. "[T]his presumption will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). When one prong of the Strickland test is not met, a reviewing court need not consider the other prong. It is proper for a reviewing court to reject a claim by addressing

the prejudice prong if that is dispositive. In re PRP of Riley, 122 Wn.2d 772, 780, 863 P.2d 554 (1993).

Defendant's claim as to the "opinion" testimony will not be further addressed here since the merits were discussed earlier. The evidence was admissible. Seattle v. Heatley, supra. The claim of sentencing error will be briefly addressed since this court has no basis on which to consider the argument on its independent merits, a point discussed in the immediately prior section. His current claim founders for the same reason, though.

Defendant argues that his counsel had no reason for not making an argument in support of the First Offender sentencing option. That is not necessarily the case. The record of the sentencing hearing suggests that there was a reason. Defense counsel argued that there was no basis for making a chemical dependency finding or imposing a DOSA sentence since there was no evidence defendant had a drug problem in need of treatment. RP 274-275. Treatment is a significant portion of the typical first offender sentence. RCW 9.94A.650(2). It may well be that either the defendant did not want to be ordered into treatment and thus opposed both DOSA and First Offender sentences, or that it was a tactical choice to eschew treatment programs in order to avoid the risk of the longer DOSA sentence since defendant would serve longer than was being recommended if a DOSA sentence were imposed that he could not live up to. In either circumstance, it

The short answer to the defendant's argument is that we do not know why counsel acted as he did. Given the strong presumption that counsel was competent, defendant can not prevail on this record. His alternative on this claim is to prepare a Personal Restraint Petition and file an affidavit from his trial attorney in support of the claim. State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10 (1991); State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995); State v. Norman, 61 Wn. App. 16, 27-28, 808 P.2d 1159, *review denied* 117 Wn.2d 1018 (1991).

The record does not support finding trial counsel ineffective. This argument, as with the previous claims, should be rejected.

V.

CONCLUSION

For the reasons stated, the conviction and sentence should be affirmed.

Respectfully submitted this 18th day of January, 2006.

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